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Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN 21 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Implementation of Sections of)
the Cable Television Consumer)
Protection and Competition Act)
of 1992)

MM Docket 92-266

Rate Regulation)

**PETITION OF BELL ATLANTIC¹
FOR LIMITED RECONSIDERATION**

1. Introduction and Summary

Competition between the cable and telephone industries is increasing rapidly as cable moves extensively into traditional telephone services free of the regulatory constraints that apply to telephone companies. As this competition intensifies, parity of regulatory treatment between the two industries is increasingly important if the marketplace is to function free of one-sided regulatory constraints that artificially favor or handicap particular competitors.

The Commission's Order in this proceeding is an important step in this direction.² Nevertheless, the rules

¹ The Bell Atlantic telephone companies ("Bell Atlantic") are The Bell Telephone Company of Pennsylvania, the four Chesapeake and Potomac telephone companies, The Diamond State Telephone Company, and New Jersey Bell Telephone Company.

² Rate Regulation, MM Dkt 92-266, Report and Order (rel. May 3, 1993) ("Order").

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adopted here for cable diverge from those that apply to telephone companies in several important respects. For example, the Order establishes price cap rules for cable with preferential terms compared to those that apply to telephone companies;³ it also permits costs of cable CPE to be recovered from basic rates while the rules for telephone CPE do not.⁴ Moreover, by declining to regulate basic rates where local authorities do not, the Commission's rules not only give preferential regulatory treatment to cable, but in many instances would leave basic cable service free of any regulation at all.⁵

Ultimately, true parity of regulation will exist only if the Commission applies to cable companies -- in both their cable and telephone operations -- regulations that parallel those that apply to local telephone companies. As an initial matter, however, the Commission should reconsider the rules adopted here to bring them into line with those that apply to telephone companies.

³ Order at 144-165.

⁴ Id. at 184-191.

⁵ Id. at 44-47.

2. The Commission Should Apply The Same Price Cap Rules To Cable That Apply To Telephone Companies

Once cable rates have been set at a reasonable level, rates for both the basic and higher programming tiers are subject to price caps. If these price caps are applied in the same manner as those for telephone companies, they can provide an important measure of regulatory parity between the two industries. But if the rules arbitrarily give preferential treatment to cable, then cable will have an artificial competitive advantage that will act to the disadvantage of consumers and competitors alike. To ensure that this does not occur, the Commission should reconsider the price cap rules adopted here in two respects.⁶

First, the Order adopts what is essentially a pure price cap regime for cable.⁷ Rates are subject to adjustment only for inflation and "external" (or exogenous) costs with no ceiling on the return that cable operators are permitted to earn.⁸ In contrast, the "sharing" feature incorporated in the

⁶ As is already true for telephone companies, the price cap for cable should also include a "productivity factor" requiring annual rate decreases in real inflation-adjusted terms. Because the Commission will include this issue in its forthcoming Second Further Notice, see Order at 147 n.558, 152 n.577, it will not be addressed here.

⁷ Order at 144-162.

⁸ Id.

price cap rules for telephone companies places a fixed ceiling on their allowed return.⁹

There is no question that a pure price cap regime has many advantages over traditional regulation from the standpoint of both economics and public policy, at least for services that do not face competition.¹⁰ Pure price caps provide greater incentives to improve productivity and efficiency, and to deploy advanced new technologies and services. They also reduce the administrative burden on both industry and regulators alike. As a result, there are many benefits to be gained from applying pure price caps to both the telephone and cable industries.

Nonetheless, the fact remains that telephone companies are currently subject to a sharing obligation. Since the cable and telephone industries are competing to deploy the same technologies and services, telephone companies would be at a severe disadvantage if cable operates under a pure price cap regime while telephone companies do not. Consequently, until the rules for telephone companies are modified, cable should be subject to a sharing obligation to the same extent as telephone companies.

⁹ See, e.g., Policy and Rules Concerning Rates For Dominant Carriers, 5 FCC Rcd 6786, 6801-6802 (1990) ("LEC Price Cap Order").

¹⁰ ~~In general, price caps are not necessary for services that are competitive.~~

Second, the Commission should modify its rules to permit cable operators to pass through "external" costs only to the extent telephone companies can do the same. In general, the telephone rules permit external treatment only for costs "triggered by administrative, legislative or judicial action beyond the control of the carriers."¹¹ Also, because in the Commission's view the index used to adjust rates for inflation (GNP-PI) is "broadbased" and reflects price changes in all sectors of the economy,¹² telephone company costs have not been afforded external treatment unless they are unique and demonstrably not reflected in GNP-PI.¹³

Here, in contrast, the Commission's Order suggests that cable automatically would be afforded external treatment for several types of costs.¹⁴ No showing that these costs are unique and not already reflected fully in GNP-PI is

¹¹ LEC Price Cap Order at 6807.

¹² Id. at 6793.

¹³ See, e.g., Treatment of LEC Tariffs Implementing Stmt. of Fin. Acct. Standards, "Employers Acct. for Postretirement Benefits Other Than Pensions", 8 FCC Rcd 1024, 1031-1035 (1992) ("OPEB Order").

¹⁴ For example, automatic external treatment would be given to taxes, programming costs, retransmission fees, and franchise fees. Order at 153-63.

contemplated.¹⁵ In fact, some costs such as taxes automatically would be treated as external for cable even though telephone companies have been denied the same treatment.¹⁶ External treatment also would be granted to other costs, such as programming costs, that are no more outside cable's control than are the costs of network equipment for telephone companies.¹⁷

Giving such preferential treatment to cable cannot be justified, and the Commission should bring its rules for cable and telephone companies into line.

3. The Commission Should Apply The Same Rules To Cable CPE That Apply To Telephone CPE

The Commission's Order requires cable CPE to be provided on an unbundled basis, at rates established based on cost. Once again, these rules can provide an important measure of regulatory parity if they are applied in the same manner as

¹⁵ While the costs could be passed through only to the extent the percentage increase in these costs exceed GNP-PI, this is different than determining whether the cost increase has already been factored into the "broadbased" GNP-PI in the first place.

¹⁶ See OPEB Order at 1032; Bell Atlantic Telephone Companies Tariff FCC No. 1, Transmittal 473, 7 FCC Rcd 1486, 1487 (1992) (tax law changes are "presumptively endogenous" and must "uniquely or disproportionately affect LECs...[to] qualify for exogenous cost treatment").

¹⁷ As the Commission recognizes, this is especially true in the case of programming obtained from affiliated programmers. Order at 158. Permitting cable operators to pass through increases paid to programming affiliates would merely shift cable's ability to recoup monopoly profits upstream to their programming affiliates.

the rules for telephone CPE, and the Commission should modify its rules to ensure that this is the case.

Specifically, the rules established here purport to require "complete unbundling" of cable CPE,¹⁸ but would nonetheless permit cable operators to lump the cost of promotional equipment offerings into general system overhead.¹⁹ This cost would then be recovered from rates charged for other services, including basic cable rates. Because telephone companies are not permitted to do the same, these rules would give cable operators an artificial competitive advantage. The Commission should, therefore, modify rules to provide the same treatment for cable and telephone companies alike.

resulting regulatory gap directly contravenes Congressional intent.

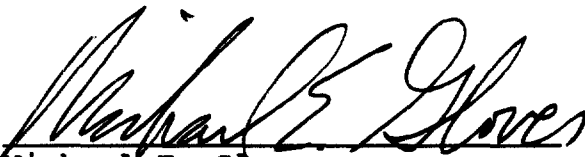
The fundamental underlying purpose of the 1992 Act is to protect consumers from the exercise of market power by regulating cable rates in the absence of effective competition.²¹ The statute gives effect to this purpose by directing that "[t]he Commission shall, by regulation, ensure that the rates for the basic service tier are reasonable" in order to "protect[] subscribers of any cable system that is not subject to effective competition from rates for the basic service tier that exceed [competitive] rates."²² By creating a regulatory vacuum in which an entire category of systems are left free of any regulation, therefore, the Commission's rules are ~~entirely~~ ~~in~~ ~~the~~ ~~statute's~~ ~~stated~~ ~~purpose~~ ~~and~~ ~~its~~ ~~ambition~~

CONCLUSION

The Commission should reconsider its rate regulation rules for cable in the respects identified above.

Respectfully submitted,

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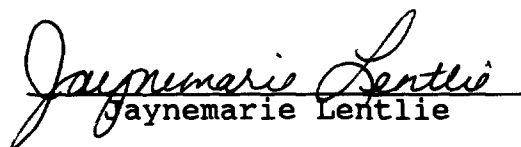

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